80-1746

No. _____

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY ANASTASIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether two defendants jointly charged as to some offenses may, under Federal Rule of Criminal Procedure 8(b), permissibly be tried together when there are numerous unrelated charges, requiring different proof, that on other occasions one of the defendants committed similar offenses.

2. Whether a violation of 29 U.S.C. §186(b)(1), based upon the prohibitions of 29 U.S.C. §186(a)(1), a *malum prohibitum* misdemeanor, is a predicate offense for conspiracy to racketeer, 18 U.S.C. §1962(d), or whether Congress intended only to make the 29 U.S.C. §186 bribery-type offenses a predicate under 18 U.S.C. §1961.*

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* *Note pursuant to Rule 21 (b):* In the court below, Anthony M. Scotto was a co-appellant with petitioner Anthony Anastasio.

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Statement	2
Reasons For Granting The Writ	4
Conclusion	12
Appendix A	1a
Appendix B	19a
Appendix C	21a

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TABLE OF AUTHORITIES

CASES:	PAGE
Chubet v. *United States,* 414 F.2d 1018 (8th Cir. 1969)	6
Cupo v. *United States,* 359 F.2d 990 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1013 (1967)	5
Fay v. *Noia,* 372 U.S. 391 (1963)	10
Henry v. *Mississippi,* 379 U.S. 443 (1965)	10
Ingram v. *United States,* 272 F.2d 567 (4th Cir. 1959)	6
Johnson v. *Zerbst,* 304 U.S. 458 (1938)	10
McElroy v. *United States,* 164 U.S. 76 (1896)	5, 8
Schaffer v. *United States,* 362 U.S. 511 (1960)	5, 7
United States v. *Bova,* 493 F.2d 33 (5th Cir. 1974)	6
United States v. *Eagleston,* 417 F.2d 11 (10th Cir. 1969)	6
United States v. *Gentile,* 495 F.2d 626 (5th Cir. 1974)	7
United States v. *Gougis,* 374 F.2d 758 (7th Cir. 1967)	6
United States v. *Graci,* 504 F.2d 411 (3rd Cir. 1974)	6, 8
United States v. *United States Gypsum Co.,* 438 U.S. 422 (1978)	11
United States v. *Kaplan,* 588 F.2d 71 (4th Cir. 1978)	5
United States v. *King,* 355 F.2d 700 (1st Cir. 1966)	7
United States v. *Marionneaux,* 514 F.2d 1244 (5th Cir. 1975)	6
United States v. *Nettles,* 570 F.2d 547 (5th Cir. 1978)	6, 8
United States v. *Reynolds,* 489 F.2d 4 (6th Cir. 1973), *cert. denied,* 416 U.S. 988 (1974)	6
United States v. *Ryan,* 350 U.S. 299 (1956)	11
United States v. *Satterfield,* 548 F.2d 1341 (9th Cir. 1977), *cert. denied,* 439 U.S. 840 (1978)	6, 8
United States v. *Seidel,* 620 F.2d 1006 (4th Cir. 1980)	6, 8
United States v. *Spector,* 326 F.2d 345 (7th Cir. 1963)	6
United States v. *Sutton,* 605 F.2d 260 (6th Cir. 1979)	5

Table of Authorities Continued

CASES:	PAGE
United States v. *Turkette*, 632 F.2d 896, *cert. granted*, 49 U.S.L.W. 3531 (U.S. January 26, 1981) (No. 80-808)	5, 7
United States v. *Whitehead*, 539 F.2d 1023 (4th Cir. 1976)	6
Ward v. *United States*, 289 F.2d 877 (D.C. Cir. 1961)	6

STATUTES AND RULES:

18 U.S.C. § 201	11
18 U.S.C. § 1961	2
18 U.S.C. § 1961(1)	11
18 U.S.C. § 1962(c)	10
18 U.S.C. § 1962(d)	1, 2
26 U.S.C. § 7201	1, 2
26 U.S.C. § 7206(1)	1, 2
28 U.S.C. § 1254(1)	1
29 U.S.C. § 186	2, 10
29 U.S.C. § 186(a) (1)	10, 11
29 U.S.C. § 186(a) (4)	10, 11
29 U.S.C. § 186(b) (1)	1, 2
Federal Rule of Criminal Procedure 8	4
Federal Rule of Criminal Procedure 8(a)	5
Federal Rule of Criminal Procedure 8(b)	5, 7, *et passim*
Federal Rule of Criminal Procedure 13	8
Federal Rule of Criminal Procedure 14	9
Revised Statutes § 1024	8

Table of Authorities Continued

MISCELLANEOUS: PAGE

115 Cong. Rec. 575-607, 819-56, 952-72, 35191-217, 35287-364, 36280-93, 36294-96 (Jan. 21-23, Oct. 6-7, 12, 1970) 11

116 Cong. Rec. 591 11

H.R. Rep. No. 91-1549, 91st Cong., 1st Sess. (1970) 11

8 Moore's *Federal Practice* ¶ 8.06[2] 9

S. Rep. No. 187, 86th Cong., 1st Sess., (1959) 10

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) 11

I C. Wright, *Federal Practice and Procedure* § 144 (1969) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

ANTHONY ANASTASIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony Anastasio prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated September 2, 1980, which affirmed judgment of conviction of the United States District Court for the Southern District of New York on charges of violating 29 U.S.C. §186(b)(1), 18 U.S.C. §1962(d), 26 U.S.C. §§7201 and 7206(1).

OPINION BELOW

The opinion of the court of appeals, not yet officially reported, is reprinted as Appendix A. The opinion on the petition for rehearing and suggestion of the appropriateness of a rehearing *en banc*, not yet officially reported, is reprinted as Appendix B.

JURISDICTION

The decision of the court of appeals was rendered September 2, 1980. A timely petiton for rehearing and suggestion of the appropriateness of a rehearing *en banc* was denied on March 6, 1981. By its order of March 27, 1981, the court of appeals stayed issuance of its mandate for thirty days pending application to this Court for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

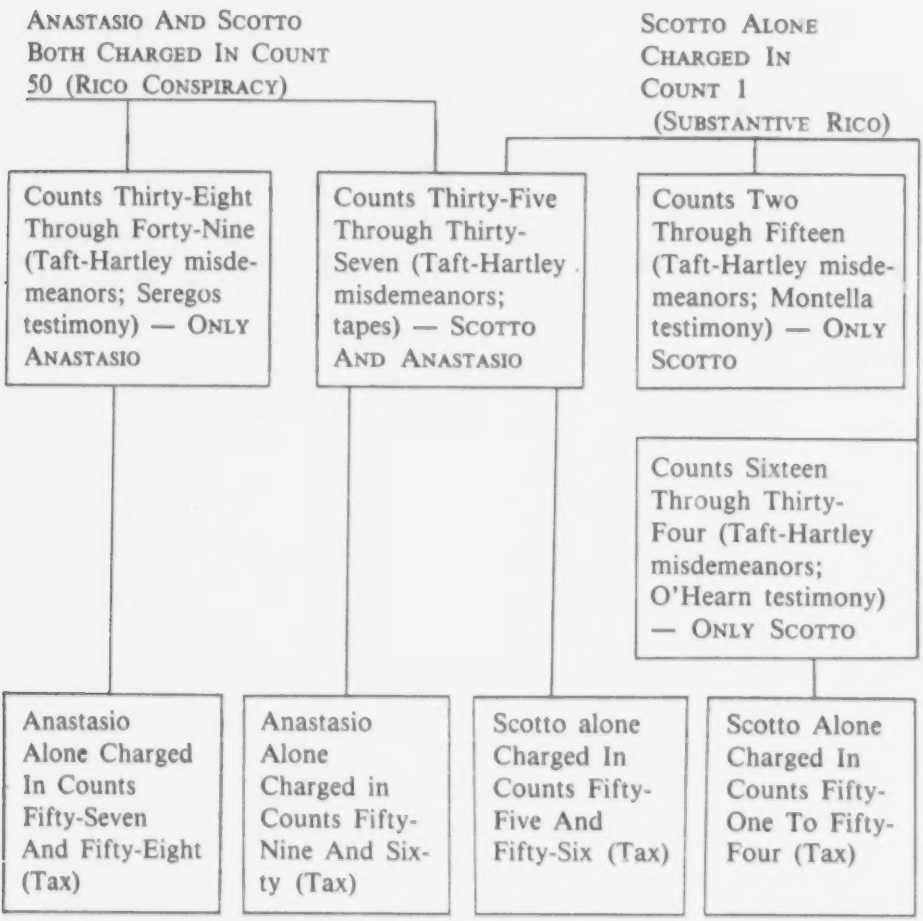
The relevant provisions of the racketeering statute (RICO), 18 U.S.C. §1961, *et seq.*, and of the Taft-Hartley Act, 29 U.S.C. §186, are set forth in App. C. *infra*, 21a.

STATEMENT

Petitioner Anthony Anastasio was charged in twenty counts of a sixty-count indictment. He was convicted of eleven Taft-Hartley Act misdemeanors, 29 U.S.C. §186(b)(1), for receipt of money from an employer of persons represented by the International Longshoreman's Association, of which he was an officer; a RICO conspiracy, 18 U.S.C. §1962(d); and two income tax violations, 26 U.S.C. §§7201 and 7206(1). He was sentenced to two years incarceration, a fine of $5,000 and an additional five year probation on completion of the sentence of incarceration.

The indictment on which Petitioner was tried contained thirty-eight counts charging co-defendant Scotto, alone, with similar offenses. The conspiracy count did not embrace the offenses charged against Scotto alone.

The indictment can be represented schematically:


ANASTASIO AND SCOTTO BOTH CHARGED IN COUNT 50 (RICO CONSPIRACY)
SCOTTO ALONE CHARGED IN COUNT 1 (SUBSTANTIVE RICO)
Counts Thirty-Eight Through Forty-Nine (Taft-Hartley misdemeanors; Seregos testimony) — ONLY ANASTASIO
Counts Thirty-Five Through Thirty-Seven (Taft-Hartley misdemeanors; tapes) — SCOTTO AND ANASTASIO
Counts Two Through Fifteen (Taft-Hartley misdemeanors; Montella testimony) — ONLY SCOTTO
Counts Sixteen Through Thirty-Four (Taft-Hartley misdemeanors; O'Hearn testimony) — ONLY SCOTTO
Anastasio Alone Charged In Counts Fifty-Seven And Fifty-Eight (Tax)
Anastasio Alone Charged in Counts Fifty-Nine And Sixty (Tax)
Scotto alone Charged In Counts Fifty-Five And Fifty-Six (Tax)
Scotto Alone Charged In Counts Fifty-One To Fifty-Four (Tax)

There is no "umbrella" that covers all the counts; thirty-eight counts charge crimes not within the scope of the conspiracy alleged against Anastasio. Forty tapes were played by the government, derived from wiretaps and bugs. Anastasio was heard on five tapes, the rest bore no relation to any charge against him. There were three primary government witnesses, Montella (984 pages of transcript), O'Hearn (971 pages) and Seregos (580 pages). The trial court acknowledged that there was "no allegation" that Anastasio "participated" in the transactions about which Montella and O'Hearn testified. Tr. 4298-99. Their testimony related to charges solely against Scotto, charges not within the scope of the conspiracy count. The Seregos payments to Anastasio were described by the government as arising from a "totally different set of facts" and constituting a "whole separate set of crimes". The government stated prior to trial that the "first thirty-three counts" of the indictment were "not asserted against the defendant Anastasio" and "are no part of the conspiracy charged in the indictment". Hearing of August 23, 1979, Tr. 19 and 24.

REASONS FOR GRANTING THE WRIT

1. At issue is a novel definition of the proper "unit" of prosecution requiring Petitioner to stand trial with a codefendant separately charged with numerous unrelated similar offenses. This interpretation of Federal Rule of Criminal Procedure 8[1] is at substantial variance

[1] Federal Rule of Criminal Procedure 8 Provides:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or plan.

with that of all other courts of appeals. It conflicts, outright, with a prior opinion of this Court, *McElroy* v. *United States*, 164 U.S. 76 (1896); and with the substance of a more recent opinion, *Schaffer* v. *United States*, 362 U.S. 511 (1960).

The rules of severance and joinder determine the "unit" of prosecution. Rule 8(a) permits, in a single defendant trial, the joining of counts charging "similar" offenses. Rule 8(b) permits the joining of defendants, but only if all counts charge offenses constituted by the same act or transaction or the same series of acts or transactions. Rule 8(b) prohibits joinder based solely upon "similar character" of alleged offenses; it requires a factual nexus connecting all the charges. All other courts of appeals have held to this view:

> When similar but unrelated offenses are jointly charged to a single defendant, some prejudice almost necessarily results, and the same is true when several defendants are jointly charged with a single offense or related offenses. Rule 8(a) permits the first sort of prejudice and Rule 8(b) the second. But the Rules do not permit cumulation of prejudice by charging several defendants with similar but unrelated offenses.

Cupo v. *United States*, 359 F.2d 990, 993 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1013 (1967).[2]

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[2] Accord, *United States* v. *Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. January 26, 1981) (No. 80-808); *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1979); *United States* v. *Kaplan*, 588 F.2d 71 (4th Cir. 1978), vacated

The court below, implicitly conflating Rule 8(a) and 8(b), held that it was sufficient that Petitioner had directly participated in, or conspired as to, some ("a substantial number") of the series of (similar) acts charged against his co-defendant. The court below found irrelevant that Petitioner had not in any way participated in, or conspired as to, a far greater number of the similar acts with which his co-defendant was charged.

> Put another way, appellant would have no objection under Rule 8(b) if the counts involving Scotto alone (1-34 and Scotto's income tax counts) had been severed (under Rule 14 or otherwise), thereby resulting in *two* trials for Scotto. But these counts were part of the series of acts committed by Scotto constituting offenses in a substantial number of which Anastasio directly participated and as to a substantial number of which he conspired. App. 20a.

The greater number of counts alleging offenses unrelated to Anastasio took up most of the trial; the proof of these charges solely against Scotto was wholly distinct from the rest of the case. It is on this precise situation

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in part on other grounds *sub nom, United States* v. *Seidel,* 620 F.2d 1006 (4th Cir. 1980); *United States* v. *Nettles,* 570 F.2d 547 (5th Cir. 1978); *United States* v. *Satterfield,* 548 F.2d 1341 (9th Cir. 1977); *United States* v. *Whitehead,* 539 F.2d 1023 (4th Cir. 1976); *United States* v. *Marionneaux,* 514 F.2d 1244 (5th Cir. 1975); *United States* v. *Graci,* 504 F.2d 411 (3rd Cir. 1974); *United States* v. *Bova,* 493 F.2d 33 (5th Cir. 1974); *United States* v. *Reynolds,* 489 F.2d 4 (6th Cir. 1973), *cert. denied,* 416 U.S. 988 (1974); *United States* v. *Eagleston,* 417 F.2d 11 (10th Cir. 1969); *Chubet* v. *United States,* 414 F.2d 1018 (8th Cir. 1969); *United States* v. *Gougis,* 374 F.2d 758 (7th Cir. 1967); *United States* v. *Spector,* 326 F.2d 345 (7th Cir. 1963); *Ward* v. *United States,* 289 F.2d 877 (D.C. Cir. 1961); *Ingram* v. *United States,* 272 F.2d 567 (4th Cir. 1959).

that all other courts have found Rule 8(b) to require severance: "Where there are no presumptive benefits from joint proof of facts relevant to *all* the acts or transactions, there is no 'series'. Rule 8(b) comes to an end and joinder is impermissible." (emphasis added) *United States* v. *King*, 355 F.2d 700, 704 (1st Cir. 1966); "While criminal acts of several defendants may be similar in nature, these acts cannot be properly joined in a multiple defendant trial if different facts and circumstances must be established to support the alleged violations." *United States* v. *Gentile,* 495 F.2d 626, 630 (5th Cir. 1974).

The question presented is similar to an issue pending before this Court in *United States* v. *Turkette, cert. granted,* 49 U.S.L.W. 3531 (U.S. January 26, 1981) (No. 80-808). In *Turkette* a RICO conspiracy count encompassed the eight other counts of a nine-count indictment. Here the RICO conspiracy count did not cover the thirty-eight unrelated counts. The similarity arose when the *Turkette* court, finding the RICO count "invalid," reversed as to the remaining counts for improper joinder under Rule 8(b). *United States* v. *Turkette,* 632 F.2d 896, 906-910 (1st Cir. 1980). The ground for reversal was that different facts needed to be shown for the joined offenses. *Id.* (632 F.2d at 909). In this case, the factual proof of the thirty-eight offenses charged against Scotto alone was wholly different from that proof on the charges relating to Anastasio.

This Court last construed Rule 8(b) in *Schaffer* v. *United States,* 362 U.S. 511 (1960). There an indictment charged seven defendants with three counts of transporting stolen property in interstate commerce and one count of conspiracy to commit those offenses. The conspiracy count was dismissed at the close of the

government's case and the substantive counts were submitted to the jury. This Court held that Rule 8(b) did not have to be retroactively applied under those facts, warning that the trial court needed to be sensitive to the danger of prejudice where "the charge *which originally justified joinder* turns out to lack the support of sufficient evidence" (emphasis added), *id.* (362 U.S. at 516). Here the conspiracy count did not purport to cover the thirty-eight unrelated counts in which the co-defendant Scotto alone was charged.

McElroy v. *United States*, 164 U.S. 76 (1896), cited by both majority and dissent in *Schaffer*, is dispositive here.[3] In *McElroy*, four indictments were consolidated, six people were named in three of the indictments and only three of the six in the fourth. As in this case, no count linked all the defendants and all the offenses. This

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[3] *McElroy* interpreted Revised Statutes §1024, from which Rule 8 and Rule 13 were recodified. "The Notes of the Advisory Committee on Rules with respect to Rules 8 and 13 indicated that they are substantially restatements of existing law. Thus the construction of §1024 of the Revised Statutes announced in *McElroy* v. *United States, supra,* still applies." *United States* v. *Graci,* 504 F.2d 411, 413 (3rd Cir. 1974). Also *see Graci* for its thorough discussion of whether the "harmless error" doctrine can be applied to Rule 8(b) misjoinder, reviewing the disagreement among the Circuits at the time. *Id.* (504 F.2d at 413-414). Since that date, the Fifth Circuit has reaffirmed its adherence to the view that Rule 8(b) misjoinder is "inherently prejudicial". *United States* v. *Nettles,* 570 F.2d 547, 551 (5th Cir. 1978). The Fourth Circuit has adopted the "harmless error" standard in *United States* v. *Seidel,* 620 F.2d 1006 (4th Cir. 1980), finding that the same evidence could have been introduced in the severed trial. Here the evidence against Scotto on the thirty-eight unrelated counts, constituting the bulk of the government's case, could not on any theory have been introduced in the severed trial. *See United States* v. *Satterfield,* 548 F.2d 1341, 1346 (9th Cir. 1977.)

Court found the joinder to be error: "[S]uch joinder cannot be sustained where the parties are not the same and where the offences are nowise part of the same transaction and must depend upon evidence of a different state of facts as to each or some of them." *Id.* (164 U.S. at 81).

The aberrant interpretation of Rule 8(b) by the court below merits review by this Court. The latitudinarian construction of Rule 8(b) by the court below subjects the misjoined defendant to an intolerable risk of prejudice. Such an interpretation has been criticized by all other courts and commentators.[4] Rule 8(b) had served as a restraint balancing the judicial economy arising from common proof with the prejudice inherent in joinder of defendants. When separate proof of unrelated offenses is required, as here, all that remains is the prejudice. And this should be prohibited, by the uniform application of the heretofore unquestioned requirement of Federal Rule of Criminal Procedure 8(b).[5]

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[4] E.g., I C. Wright, *Federal Practice and Procedure* §144 (1969) & (Supp. 1980); 8 Moore's *Federal Practice* ¶ 8.06[2].

[5] The government has contended that Anastasio failed to move for a severence on Rule 8 grounds prior to trial. In its opinion, the court below at first accepted this contention, App. 16a, but went on to state:

> Appellant Scotto *offered a motion under Rule 8,* as well as a motion under Rule 14, before the trial began. He moved pursuant to both rules to sever himself from Anastasio or, in the alternative, to sever a number of new substantive Taft-Hartley counts in a superseding indictment charging Anastasio with Seregos payments. Anastasio did not join in this motion, we assume for practical reasons since if the motion were granted in the alternative he would be required to stand trial twice.
>
> On September 10, 1979, the day before the trial started, the Goverment filed a superseding indictment, dropping a mail fraud charge as well as four Taft-Hartley counts against Scotto alone. At that time Scotto *renewed his earlier severance motions.* In the alternative, Scotto moved to dismiss the RICO

2. Of importance to the administration of justice is the review of the court below's conclusion that conviction for conspiracy to violate 18 U.S.C. §1962(c), RICO, could take as its predicate violations of those sections of 29 U.S.C. §186 constituting *malum prohibitum,* non-*mens rea,* offenses. Section 186 prohibits payments ranging from those characterizable simply as "payments" to "bribes," from "corrupt" payments to those properly describable as "unfair labor practices". S. Rep. No. 187, 86th Cong., 1st Sess., p. 10 (1959). Section 186 includes one "bribery" offense, §186(a) (4), requiring intent to be

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conspiracy count on the ground that there were now not one but multiple conspiracies charged. *Anastasio's counsel "join[ed] in the application for a severance of [his] client. . . ."* App. 17a (emphasis added).

Petitioned for rehearing with the court's attention directed to: (1) the memorandum decision of the trial court of January 30, 1980 stating "Defendant Anastasio, in the course of the trial (*See* Esp. Rec. at 4297) moved for a severence of his trial under Rule 8(b). . . ." (Mem. op. of 1/30/80 at p. 6); (2) the statement of the trial court "that there was a Rule 8 motion by the defendants pre-trial." Tr. 4309-4311; and (3) the argument of counsel for Anastasio after joining pre-trial in co-counsel's Rule 8 motion on September 10, 1979, identifying the precise grounds for the misjoinder as argued herein (Hearing of September 10, 1979, Tr. 26-27), the panel abandoned its self-contradictory assertion of the first opinion that Anastasio had both not moved under Rule 8 *and* that he had joined in his co-defendant's Rule 8 motion. In the "Order on Petition for Rehearing by Appellant Anthony Anastasio, the court begins "[t]reating appellant's motion under Rule 8(b) as properly and timely made. . . ." App. 19a.

By any standard of "waiver" ever considered by this Court, Petitioner cannot have failed to preserve his motion when he joined co-counsel's motion prior to trial, explained the grounds requiring the severance, and repeated the motion in the course of the trial. *See, Henry* v. *Mississippi,* 379 U.S. 443 (1965); *Fay* v. *Noia,* 372 U.S. 391 (1963); *Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

influenced. Here §186(a) (1), containing no intent requirement[6], was held a RICO predicate.

While the legislative history does not reflect the precise reason for including §186 as a RICO predicate, the legislative purpose is clear; coercive and serious intentional offenses were targeted. *See, e.g.,* S. Rep. No. 91-617, p. 158; 116 Cong. Rec. 591. Thus 18 U.S.C. §1961(1) makes 18 U.S.C. §201 (bribery) a predicate offense, but 18 U.S.C. §209 (excess compensation), the *malum prohibitum* analogue to 29 U.S.C. §186(a)(1), is not included.

Making every §186 offense a predicate for RICO violates both the legislative intent and a settled rule of construction of federal criminal statutes. Since §186(a)(4) requires "intent," and RICO is a serious crime, the presumption adverted to in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978) comes into play:

> Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them.

When one surveys the intent of RICO's sponsors, and assays the evils they sought to eradicate, the "intent" in question is most logically that required by §186(a)(4) — the intent to be influenced. An intent to dispense with *mens rea* in a major felony statute is nowhere reflected in the legislative history.[7]

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[6] *United States* v. *Ryan,* 350 U.S. 299, 305 (1956).

[7] S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91-1549, 91st Cong., 1st Sess. (1970); 115 Cong. Rec. 575-607, 819-56, 952-72, 35191-217, 35287-364, 36280-93, 36294-96 (Jan. 21-23, Oct. 6-7, 12, 1970).

CONCLUSION

For all the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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Anthony Anastasio

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 1131-32 — September Term, 1979

(Argued May 20, 1980

Decided September 2, 1980)

Docket Nos. 80-1041, -1044

UNITED STATES OF AMERICA, *Appellee,*

v.

ANTHONY M. SCOTTO and
ANTHONY ANASTASIO, *Appellants.*

(Filed September 2, 1980)

Before OAKES and MESKILL, *Circuit Judges,* and BONSAL, *District Judge.**

Appeal from judgments after a jury trial entered in the United States District Court for the Southern District of New York, Charles E. Stewart, *Judge,* convicting appellant Scotto of violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §1962(c), and convicting appellants Scotto and Anastasio of conspiracy to violate the RICO statute, 18 U.S.C. §1962(d), Taft-Hartley violations, 29 U.S.C. §186(b), and income tax violations, 26 U.S.C. §§7201, 7206(1). Over allegations of errors in the district court's charges to the jury and rulings on appellants' misjoinder claims, the judgments are affirmed.

EDWARD BENNETT WILLIAMS
Washington, D.C. (Williams
& Connolly, Harold
Ungar, Richard M.
Cooper, of counsel),
for Appellant Scotto.

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* Senior District Judge of the Southern District of New York, sitting by designation.

MICHAEL E. TIGAR
Washington, D.C. (John Mage, Lynne Bernabei,

Washington, D.C., Gustave H. Newman, New York, New York, of counsel), *for Appellant Anastasio.*

ALAN LEVINE
Assistant United States Attorney (William M. Tendy, United States Attorney for the Southern District of New York, Scott W. Muller, Howard W. Goldstein, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

Anthony M. Scotto and Anthony Anastasio, not contesting the sufficiency of the evidence, appeal from judgments of convictions on forty-three counts entered after an eight-week jury trial in the United States District Court for the Southern District of New York, Charles E. Stewart, Judge. The counts included one against Scotto, then president of Local 1814 of the International Longshoremen's Association (ILA), for participating in the affairs of the ILA through a pattern of racketeering activity from 1974 through part of January 1979 in violation of 18 U.S.C. §1962(c) (Count 1); a count charging both Scotto and Anastasio, then executive vice president of Local 1814, with conspiring to participate in the affairs of the ILA through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(d) (Count 50); twenty-four counts against Scotto (Counts 2-9, 16-30, 34), eight counts against Anastasio (38-45) and three counts against both (Counts 35-37) for demanding and receiving unlawful "labor"

payments totalling in excess of $250,000, in violation of the Taft-Hartley Act, 29 U.S.C. §186(b); and four counts against Scotto (Counts 53-56) and two counts against Anastasio (Counts 59, 60) for failure to report and pay federal income taxes on the unlawful amounts obtained from the foregoing activities, in violation of 26 U.S.C. §§7201 and 7206(1). The jury was unable to reach a verdict on seventeen other counts alleging additional Taft-Hartley and tax violations (Counts 10-15, 31-33, 46-49, 51-52, 57-58). The sentences are set out in the margin.[1] We affirm the judgments.

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[1] Scotto was sentenced to five years' imprisonment and a $25,000 fine on Count 1; consecutive one-year terms of imprisonment on Counts 2-6, for a total of five years, to run concurrently with the sentence imposed on Count 1; $5,000 fines on Counts 2-6, totaling $25,000; five years' probation on each of Counts 7-9, to run concurrently and to commence upon expiration of the period of incarceration; $5,000 fines on Counts 16-20, totaling $25,000; a suspended sentence and five years' probation on Counts 21-30 and 34-37; a suspended sentence, five years' probation to run concurrently with the sentence imposed on Count 1, and a $25,000 fine on Count 50; five years' imprisonment on each of Counts 53 and 55, to run concurrently with the sentence on Count 1; and three years' imprisonment on each of Counts 54 and 56, to run concurrently and concurrently with the sentence imposed on Count 1. Thus, the effective sentence imposed on Scotto was five years' imprisonment, with five years' probation following completion of his prison term, and $75,000 in fines.

Anastasio was sentenced to concurrent one-year terms of imprisonment and concurrent fines of $5,000 on Counts 38-42; concurrent one-year terms of imprisonment, consecutive to the one-year term imposed on Count 38, and concurrent $5,000 fines on Counts 35-37 and 43-45, the fines imposed concurrently with the $5,000 concurrent fines on Counts 38-42; a concurrent two-year term of imprisonment and concurrent $5,000 fine on Count 50; and a suspended sentence and five years' probation on Counts 59-60. This amounted to an effective sentence of two years in prison, five years' probation, and a $5,000 fine.

FACTS

From 1975 through 1979, appellant Scotto was president of ILA Local 1814 in Brooklyn and vice president for legislative affairs for the ILA nationally. From 1975 through April of 1978, Anastasio was secretary-treasurer of an associated ILA local in Brooklyn and he subsequently became executive vice president of Scotto's Local 1814. He was also an ILA national organizer. The Government's evidence was that they individually and jointly received illegal labor payoffs during the period from 1975 through 1979 from six separate waterfront businesses employing ILA members. The evidence showed the receipt of more than forty separate cash payments, some as high as $15,000, as kickbacks or commissions on business and as "extra" Christmas bonuses.

Walter D. O'Hearn, chief executive of John W. McGrath Corp. of Brooklyn, a stevedore company, paid Scotto $15,000 quarterly and $5,000 at Christmas, for a total of $65,000 annually, to obtain his assistance in reducing fraudulent and exaggerated workmen's compensation claims filed by members of Scotto's local. William Montella, general manager of Quin Marine Services, Inc., of Brooklyn, paid Scotto $5,000 quarterly and $5,000 extra each Christmas for a three-year period to secure his assistance in getting new business and keeping existing customers from competitor shipping and stevedoring companies with which Scotto dealt as a labor leader. Nicholas Seregos of Jackson Engineering Co., Inc., an ILA-affiliated marine engineering company doing general ship repair, paid Anastasio a 10% "commission" on business obtained for his company with Scotto's and Anastasio's assistance from Prudential Lines, Inc., and United States Lines. Additionally, other cash payments of thousands of dollars were received by Scotto alone or by Scotto and Anastasio from individuals representing waterfront employers of ILA labor, including C. C. Lumber Co. of Brooklyn, American Navigation Co. of Baltimore, Marine Repair Services, Inc., of Staten Island, and Joseph Vinal Ship Maintenance Co. of Manhattan. The proof also established

that Scotto and Anastasio failed to declare the payoffs on their federal income tax returns, amounting in Scotto's case to $69,700 in 1975, $90,000 in 1976, and $83,500 in 1977, and in Anastasio's case to $6,500 in 1976 and $16,500 in 1977.

Scotto, who took the stand in his own defense, denied receiving any payments from Montella or O'Hearn before January of 1977. As to the payments made thereafter, Scotto admitted accepting them, but claimed he was acting only as a conduit for campaign contributions, $50,000 to the 1977 New York City mayoral campaign of Mario Cuomo, and $25,000 to the 1978 New York State gubernatorial campaign of Governor Hugh Carey. Louis Valentino, a state official, testified that he received the $50,000 in cash for the Cuomo campaign from Anastasio at Scotto's direction, and Joseph Colozza, an ILA official from Scotto's local in charge of Governor Carey's Queens campaign, testified to receiving $25,000 in cash from Scotto. However, no records of these transactions and no reports to the New York State Board of Elections were ever made. Cross-examination of Scotto revealed that, in a tape-recorded conversation with Montella in October 1978, Scotto said that if any inquiries were ever made, he would claim the illegal monies received were for political and charitable contributions. Scotto denied the 10% commission arrangement with Nicholas Seregos, as well as receipt of any cash payoffs by Scotto and Anastasio from Joseph Vinal Ship Maintenance Co. or Marine Repair Services, Inc. He explained that the cash payment from Joseph Lacqua, an officer of C.C. Lumber Co. and American Navigation Co., was intended for and ultimately given to Scotto's wife. The jury disbelieved the "conduit" defense and other exculpatory testimony.

Anastasio did not testify on his own behalf. He did call one character witness and Anthony Valvo, a shop steward who testified to contacting Anastasio on behalf of Seregos in 1974 concerning the unionizing of Jackson Engineering Co.

Discussion

I. The RICO and RICO conspiracy convictions — instruction on the element of "conduct of [the] enterprise's affairs"

Among the principal arguments on appeal are those focusing on the "RICO" and "RICO conspiracy" convictions. RICO, an acronym for that part of the Organized Crime Control Act of 1970 dealing with Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§1961-68; *see generally* H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4010, 4032-33, specifically includes within its definition of "racketeering activity" a wide variety of serious criminal acts under federal and state law, among them "any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations)." *Id.* §1961(1)(C). It furthermore defines "pattern of racketeering activity" as "requir[ing] at least two acts of racketeering activity." *Id.* §1961(5). The term "enterprise" includes "any union." *Id.* §1961(4). Under 18 U.S.C. §1962(c),[2] it is

[2] 18 U.S.C. §1962 provides in part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." *Id.* There also is a prohibition against "conspir[ing] to violate any of the provisions" of subsection (c) of §1962. *Id.* (d).

The RICO statute has been upheld as not unconstitutionally vague. *E.g., United States* v. *Huber,* 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied,* 100 S. Ct. 1312 (1980); *United States* v. *Swiderski,* 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 933 (1979); *United States* v. *Campanale,* 518 F.2d 352, 364 (9th Cir. 1975) (per curiam), *cert. denied,* 423 U.S. 1050 (1976); *United States* v. *Field,* 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1371 (2d Cir.), *cert. dismissed,* 439 U.S. 801 (1978). It has been applied in a variety of circumstances, *e.g., United States* v. *Boylan,* 620 F.2d 359, 360-62 (2d Cir. 1980) (RICO count and illegal labor payments counts not multiplicitous and not violative of double jeopardy; RICO count does not include separate scienter element over and above that required for predicate crimes), *petition for cert. filed,* 48 U.S.L.W. 3787 (U.S. May 20, 1980); *United States* v. *Weisman,* No. 79-1315, slip op. at 2229 (2d Cir. Apr. 4, 1980), *petition for cert. filed,* 49 U.S.L.W. 3018 (U.S. July 10, 1980) (affairs of theater conducted through a pattern of racketeering activity including predicate acts of securities and bankruptcy fraud); *United States* v. *Huber, supra,* 603 F.2d at 387 (pattern of racketeering activity involving fraudulent execution of medical services and supplies contracts by a group of corporations).

Appellant Scotto's basic argument is that the jury was inadequately instructed on the issue whether he conducted the union's affairs through a pattern of racketeering activity, namely through the Taft-Hartley violations. He suggests that the district court's charge was inadequate because of a failure to require a sufficient nexus between the predicate misconduct and the conduct of the enterprise, and a failure to explore

more fully the statutory language pertaining to the "conduct of such enterprise's affairs." Scotto notes that in cases in which an established legitimate entity as opposed to a criminal enterprise is involved, the conduct of the affairs element assumes great significance. Appellant places principal reliance on *United States* v. *Nerone,* 563 F.2d 836, 851-52 (7th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978), holding that the Government's case failed because of inadequate proof of a connection between the racketeering activities, illegal gambling, and the corporation operating the trailer park where the gambling occurred. *See also United States* v. *Huber, supra,* 603 F.2d at 395 (summarizing *Nerone).* He also cites, among other cases, *United States* v. *Dennis,* 458 F. Supp. 197 (E.D. Mo. 1978), in which the court found an indictment faulty under RICO because of its failure to assert any nexus between the alleged activities and the conduct of the enterprise. The court noted: "The mere fact that defendant is employed by the enterprise [General Motors Assembly Division] and collects unlawful debts on the premises of the enterprise . . . does not establish that the defendant participated in the conduct of the enterprise's affairs through the collection of the debts." *Id.* at 199.

The Government first argues that Scotto failed properly to preserve this claim regarding the court's jury charge. It is true that the district court during an all-day charging conference read verbatim the portion of its charge about which Scotto now complains and that defense counsel at that time declined to object to the charge. However, Scotto did both submit his own request to charge on the subject[3] and make a

[3] The statute requires not only that you find two substantive crimes to establish a pattern of racketeering activity, you must also find that the defendant Scotto conducted the affairs of the I.L.A. through the alleged pattern of racketeering. In order to find that the defendant Scotto conducted the I.L.A.'s affairs through a pattern of racketeering, you must find that both of the alleged labor violations *concerned or related to the operation or management of the enterprise. You must find that the pattern of racketeering [a]ffected the affairs of the I.L.A. in its essential functions.* In order to find that the affairs of the

blanket objection to the court's failure to incorporate Scotto's suggested charges in the court's instructions. Assuming without deciding that Scotto has preserved his appeal, we reach the merits of this faulty instruction issue.

The district court instructed the jury that the Government must prove beyond a reasonable doubt:

> [T]hat through the two or more of these connected racketeering offenses the defendant Scotto conducted or participated directly or indirectly in the conduct of the affairs of that enterprise.

And the court went on to explain:

> [Y]ou must find beyond a reasonable doubt that the defendant committed the two or more of the offenses alleged in Counts 2 through 37 *while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise.*
>
> In this regard it is not necessary for the Government to prove that the affairs of the enterprise were advanced by the defendant's activities, although you may find this to be true, or that the particular enterprise was corrupt or that the enterprise authorized the defendant to commit the particular acts of racketeering activity alleged.
>
> It is only necessary to find that the acts were committed by the defendant or caused to be committed by him in the conduct of, or his participation in, the affairs of the enterprise. (Emphasis added.)

I.L.A. were conducted through a pattern of racketeering you must find beyond a reasonable doubt *that there was a connection between the so-called acts of racketeering and the affairs of the I.L.A.* If this essential connection has not been proved then you must acquit the defendant Scotto of the charge in Count I, even if you find that all of the alleged payments were unlawfully made. (Emphasis added.) Appendix to Brief of Appellant Scotto at 46.

Appellant wanted the court to state that the jury was required to find that the predicate acts "concerned or related to the operation or management of the enterprise" and "[a]ffected the affairs of the I.L.A. in its essential functions." But appellant cites no case demanding that a jury charge include his proposed or similar language. *United States* v. *Huber, supra,* and *United States* v. *Nerone, supra,* two of the cases upon which appellant relies, involved challenges to allegations in the indictment or to the sufficiency of the evidence; they did not discuss the language to be used in charging the jury about the conduct of the enterprise. In any event, their holdings concerning the degree of interrelationship required do not go as far as appellant would like. We agree with Judge Pierce, in *United States* v. *Stofsky,* 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976), that the statute "does not define [the] connection by distinguishing between predicate acts which play a major or a minor role, or any role at all, in what might be seen as the usual operations of the enterprise; nor does it require that such acts be in furtherance of the enterprise. . . ." *Id.* at 613. The statute, then, declines to define in quantitative terms the degree of interrelationship between the pattern of racketeering and the conduct of the enterprise's affairs.

We think that one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise. Simply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient. *Cf. United States* v. *Rubin,* 559 F.2d 975, 990 (5th Cir. 1977), *vacated on other grounds,* 439 U.S. 810 (1978), *rev'd in part on other grounds,* 591 F.2d 278 (5th Cir. 1979) (RICO requires "some relationship between the proscribed acts and the maintenance of union posi-

tion"). But, as Judge Lasker noted in *United States* v. *Field, supra:*

> Section 1962(c) nowhere requires proof regarding the advancement of the union's affairs by the defendant's activities, or proof that the union itself is corrupt, or proof that the union authorized the defendant to do whatever acts form the basis for the charge. It requires only that the government establish that the defendant's acts were committed in the conduct of the union's affairs.

432 F. Supp. at 58. Furthermore, we do not think it necessary for a person to solidify or otherwise enhance his position in the enterprise through commission of the predicate violations.

The court below properly told the jury that it was necessary to find that the defendant committed two or more of the offenses alleged in Counts 2 through 37 "while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise." The charge did not have to require that the ILA was itself corrupted or even that the union's policies and administration were changed by the racketeering pattern. Judge Stewart in this case emphasized more clearly the need for a connection than a charge upheld in *United States* v. *Rubin, supra*, 559 F.2d at 989-90. There, the Fifth Circuit declined to find reversible error in the district court's failure to add to the charge the defendant's proffered words "by means of," in addition to the word "through," and approved an instruction, tracking the language of §1962(c), that the Government had to prove that the defendant participated in the affairs of the union "through" the two or more offenses. We thus find no error in this part of the charge.

II. RICO — mens rea

Appellant Scotto argues that the RICO conviction is invalid and both appellants allege that the RICO conspiracy convictions are invalid because the district court failed to instruct the jury adequately on *mens rea*. The statute on its face is silent on the issue of *mens rea*. Scotto attributes the lack of

mens rea language in the RICO statute to a congressional oversight. Appellants argue that this silence is ordinarily overlooked because most of the predicate offenses listed in §1961, such as murder, kidnapping, arson and robbery, themselves require high degrees of *mens rea*. Unlike these other listed predicate offenses, a Taft-Hartley violation of 29 U.S.C. §186[4] is a non-*mens rea* misdemeanor. Consequently, their argument runs, a RICO indictment predicated solely on violations of §186 could produce a twenty-year sentence without any proof of *mens rea*, an unfair result, unless RICO *itself* supplies some additional *mens rea* requirement.

As we recently stated in *United States* v. *Boylan*, 620 F.2d at 361-62, "[t]he RICO count does not include a scienter element over and above that required by the predicate crimes, in this case the violations of 29 U.S.C. §186(b)(1)." The charge delivered by the district court in *Boylan*, which imposed an intent element on the defendant as a taker of a

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[4] 29 U.S.C. §186 provides in part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> . . .
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

§186(a) payment, was upheld and characterized as "more favorable to defendant than required by *United States* v. *Ricciardi*, 357 F.2d 91, 99 (2d Cir. 1966)." *Boylan*, 620 F.2d at 362. In the instant case, Judge Stewart required the jury, before it rendered RICO convictions, to find that the defendant under consideration "acted wilfully and knowingly," that he "knew what he was doing and that he did it deliberately and voluntarily," that he acted "knowingly and deliberately with a criminal motive or purpose," and that he "was aware of the general unlawful nature of his act."

Scotto further argues that the instruction was improper because it did not require the jury to find a willful violation of RICO. Relying on *United States* v. *Winston*, 558 F.2d 105, 107-09 (2d Cir. 1977), he defines the term "willfully" as intentionally violating a "known legal duty." *Winston*, however, involved a violation of Subsection Tenth, §2 of the Railway Labor Act, 45 U.S.C. §152, which specifically requires a "willful failure . . . to comply with the terms" of *other* subsections of the law. The law at issue here does not demand willful violations of the RICO statute, nor does it require willful violations of the predicate offenses, which would make the *Winston* case analagous. Therefore, although the Government concedes that willfully committing some unlawful predicate act is necessary, no specific intent to engage in an unlawful pattern of racketeering prohibited by RICO is required. Here, as in *Boylan*, we think the court's charge was favorable to the defendant because it permitted conviction under RICO only if the jury found a "criminal motive or purpose." Even the cases cited by Scotto do not require as much.

The argument made by both appellants attacking the district court's view of the intent necessary for a RICO conspiracy conviction also lacks werit. In the part of the jury charge dealing with the conspiracy count, Judge Stewart repeated some of the language from his charge on the substantive RICO offense. He also stated at one point that appellants must be found to have "participated in the conspiracy with a specific and criminal intent, that is, a purpose

to violate the law." If anything, the district court erred in favor of the appellants by delivering this portion of the charge in which it implied that a specific intent to violate the RICO conspiracy provision was required. We have no reason to believe, however, from the words of the statute or from general criminal law doctrine, that the quantum of *mens rea* required for a RICO conspiracy conviction should be different from or greater than that required for a substantive RICO offense. 18 U.S.C. §1962(d). *See United States* v. *Feola*, 420 U.S. 671, 686-88 (1975); *United States* v. *Mauro*, 501 F.2d 45, 51 (2d Cir.), *cert. denied*, 419 U.S. 969 (1974).

III. Section 186 counts as lesser included offenses in RICO

Appellant Scotto argues that multiple sentences, even if concurrent, cannot be imposed for violations of RICO and §186 because §186 Taft-Hartley Act violations are lesser included offenses, citing *United States* v. *Umans*, 368 F.2d 725, 730 (2d Cir. 1966), *cert. dismissed*, 389 U.S. 80 (1967). The argument is that §186 violations are lesser included offenses because all of their elements, plus other elements, must be proved to show a RICO violation predicated as here on violations of §186. *See Sansone* v. *United States*, 380 U.S. 343, 349-50 (1965) (defining lesser included offenses); *United States* v. *Markis*, 352 F.2d 860, 865-67 (2d Cir. 1965), *vacated on other grounds*, 387 U.S. 425 (1967).

This issue was, however, resolved contrary to appellant Scotto's position in *United States* v. *Boylan*, *supra*, 620 F.2d at 360-61. In *Boylan* this court held that RICO and §186 violations are "separate crimes, separately punishable," because they "do not proscribe the same act of transaction, and they implement different congressional purposes." *Id.* at 361. *See also United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

IV. Violation of 29 U.S.C. §186(b)(1) is a RICO predicate offense

Appellants contend that the only illegal payments that can serve as predicate offenses to a RICO violation are those

prohibited by 29 U.S.C. §186(a)(4) — a bribery provision.[5] Here, the Taft-Hartley predicate offenses charged involved the receipt of payments from an employer by a representative of his employees in violation of §186(b). Because the definition of "racketeering activity" in 18 U.S.C. §1961(1)(C) makes a violation of any part of §186 a sufficient predicate offense on which to base a RICO conviction, we reject appellants' claim. The legislative history presented by appellant Anastasio fails to convince us that the RICO statute should be given any reading other than the one indicated by its words themselves.

V. The court's charge on the elements of §186

Appellant Scotto contends that the district court improperly instructed the jury regarding the definition of the "thing of value" required to be received for a §186(b) violation. This claim relates to his "conduit" defense that the O'Hearn and Montella payments were for political campaign contributions. The court's charge defined "thing of value" as "any material thing with a monetary value" and noted that with respect to the conduit defense, the Government could not prevail if, in addition to certain other facts, the jury found that Scotto "did not benefit in any way by the payment or delivery of the money to him." This portion of the instructions was not expressly objected to at trial. Indeed, Scotto expressly agreed in the charging conference that he was required not to "benefit" from any payments. Nor was any objection made during the charging conference, a transcript of which we have reviewed, to the suggestion made by United States Attorney Fiske and later incorporated in the charge that the jury might find a benefit to Scotto simply from his delivery of campaign contributions. While we have some doubt about whether mere goodwill from delivering such contributions is properly within the meaning of "thing of value" under §186(b)(1), we do not find that part of the charge to constitute "plain error," under Fed. R. Crim. P. 52(b), in the context of long and complicated instructions. *See United*

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[5] *Id.*

States v. *Calfon*, 607 F.2d 29, 31 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1044 (1980).

Nor was the district court required, as Scotto contends, to charge the jury that Scotto had to "know" that the benefit he was receiving was a "thing of value" before he could be convicted of a §186(b) violation. This issue was not raised below and no such instruction was requested. Moreover, nothing in the language of §186 requires knowledge that what one is receiving is a "thing of value." *But see United States* v. *Holt*, 333 F.2d 455, 456-57 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965) (instruction upheld requiring knowledge that §186(b) payment was a thing of value and that it was being given by an employing company to a union leader). All that is required is an awareness of the benefit itself.

VI. Taxation of "things of value"

In a rather farfetched argument, appellant Scotto maintains that his tax convictions under Counts 55-56 should be reversed because the jury might have mistakenly thought that an intangible benefit received from conveying political contributions would constitute taxable income. He bases this contention on the fact that the district court repeated the term "things of value," used earlier in discussing the Taft-Hartley counts, to explain to the jury what constituted taxable income. In the context of the entire charge, however, we believe there was little or no chance that the jury would apply to the tax counts the district court's previous explanation of what would be a sufficient "benefit" necessary to find guilt under §186(b). Furthermore, the district court was not required as Scotto contends to tell the jury that the defense to Counts 53 and 54 was different from that to Counts 55 and 56.

VII. Misjoinder of defendants

Appellant Anastasio argues that he was misjoined with Scotto in violation of Fed. R. Crim. P. 8(b) and 14. We are convinced that he failed to make before trial the 8(b) motion which he now advances, as is required in order to preserve it

on appeal. *United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). A proper 8(b) motion must be granted if the indictment violates the rule. Anastasio did make a timely motion under Rule 14, which provides for the discretionary severance of either counts or defendants, asking the district court to order a separate trial for each defendant. Asserting that the 8(b) issue is dispositive, however, he does not now argue on appeal that the trial judge abused his discretion in denying the Rule 14 motion. Nor do we think that there was such an abuse, since it was alleged (and proven) that the codefendants participated as partners in respect to certain of the payments.

Appellant Scotto offered a motion under Rule 8, as well as a motion under Rule 14, before the trial began. He moved pursuant to both rules to sever himself from Anastasio or, in the alternative, to sever a number of new substantive Taft-Hartley counts in a superseding indictment charging Anastasio with the Seregos payments. Anastasio did not join in this motion, we assume for practical reasons since if the motion were granted in the alternative he would be required to stand trial twice.

On September 10, 1979, the day before the trial started, the Government filed a superseding indictment, dropping a mail fraud charge as well as four Taft-Hartley counts against Scotto alone. At that time Scotto renewed his earlier severance motions. In the alternative, Scotto moved to dismiss the RICO conspiracy count on the ground that there were now not one but multiple conspiracies charged. Anastasio's counsel "join[ed] in the application for a severance of [his] client. . . ." Neither defendant moved to sever the substantive racketeering count and the Taft-Hartley counts against Scotto alone from the other counts charging Scotto and Anastasio together. Thus by the time the trial commenced Anastasio had not moved the court to sever the charges against Scotto alone from the charges against both Scotto and himself. But even if Anastasio did properly raise the 8(b) issue that he now argues, there were sufficient allegations and

proof that Anastasio and Scotto participated in the same series of transactions, which included the racketeering counts and the racketeering conspiracy counts. The former is thus in no better a position than the appellant Cannatella in *United States* v. *Weisman, supra*, slip op. at 2252-54, who was not named in any RICO count or the securities fraud counts charged in the indictment against the other defendants but whose 8(b) motion was denied since, as the rule specifically provides, "all of the defendants need not be charged in each count."

Appellant Scotto also raises a misjoinder argument. Concededly, he filed a timely motion pursuant to Rules 8 and 14, which argued that the substantive Taft-Hartley counts against Anastasio (Counts 38-49) were misjoined. Those counts against Anastasio alone relate to different payments made by Seregos of Jackson Engineering Co., Inc., in the years 1977, 1978, and 1979. Jackson Engineering is also a subject of the overt acts listed in the conspiracy count. Accordingly we do not think that this joinder was erroneous. Even if it were erroneous, it would constitute harmless error in Scotto's case. *United States* v. *Werner*, 620 F.2d 922 (2d Cir. 1980).

We have carefully considered any and all other contentions of the appellants and find them to be without merit. Accordingly the judgments are affirmed.

APPENDIX B

Order on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1131-32—September Term, 1979

(Argued May 20, 1980 Decided September 2, 1980)

(On Rehearing Decided March 6, 1981)

Docket Nos. 80-1041, 80-1044

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY M. SCOTTO and
ANTHONY ANASTASIO,

Appellants.

ORDER ON PETITION FOR REHEARING BY APPELLANT ANTHONY ANASTASIO

Treating appellant's motion under Rule 8(b) as properly and timely made, it was properly denied. This is true because, as required by Rule 8(b), the appellants were "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." "[A]ll of the defendants need not be charged in each count." Fed. R. Crim. P. 8(b). As Judge Stewart pointed out in his memorandum decision, No. 79 Cr. 32 at 7 (S.D.N.Y. Jan. 1, 1980), appellant Anastasio

was named alone in twenty counts out of sixty and jointly with appellant Scotto in three substantive counts. Also, Count 50, which charges them with conspiracy, incorporated the allegations in Counts 35-49 (all of which name appellant Anastasio) as "describing some of the means by which the defendants committed the offenses charged."

Put another way, appellant would have no objection under Rule 8(b) if the counts involving Scotto alone (1-34 and Scotto's income tax counts) had been severed (under Rule 14 or otherwise), thereby resulting in *two* trials for Scotto. But these counts were part of the series of acts committed by Scotto constituting offenses in a substantial number of which Anastasio directly participated and as to a substantial number of which he conspired.

Accordingly, the petition for rehearing is denied.

JAMES L. OAKES,

THOMAS J. MESKILL,
Circuit Judges

DUDLEY B. BONSAL,
District Judge

APPENDIX C

Statutes Involved

Racketeer Influenced And Corrupt Organizations, 18 U.S.C. 1961, *et seq.*

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic); (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiv-

ing, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any

violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or

transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

* * *

Taft-Hartley Act, 29 U.S.C. 186

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to

influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * *

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